SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/22/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000116

FILED: 11/05/2001

STATE OF ARIZONA

MICHAEL A LEE

v.

CLYDE NEISWENDER

DAN SAINT

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of Oral Argument on October 1, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. The Court has considered the oral argument of counsel, Memoranda submitted, the exhibits made of record and the record of the proceedings from the Phoenix City Court.

Appellant, Clyde Neiswender, was accused of violating A.R.S. Section 13-1422(A) and (B), Owning or Operating a Sexually Oriented Business Which Remained Opened Outside of the Designated Lawful Hours, which was a class 1 misdemeanor offense. The crime was alleged to have occurred on December 9, 1999. Appellant was the manager of the Blue Moon, a sexually oriented business frequently referred to as an adult cabaret.

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Appellant was convicted after a trial to the court and was sentenced on February 7, 2001 to pay a fine of $443.00. Appellant filed a timely Notice of Appeal.

1. **Standard of Review**

Appellant raises a number of issues of constitutional dimension and statutory construction. In matters of statutory interpretation, the standard of review is *de novo.*[1] However, the appellate court does not reweigh the evidence.[2] Instead, the evidence is reviewed in a light most favorable to affirming the lower court's ruling.[3] Appellate courts must also review the constitutionality of a statute *de novo*.[4]

2. **Appellant's Responsibility under the Statute**

Appellant alleges that he is not personally subject to liability under A.R.S. Section 13-1422 because the statute only allows the business entity to be liable.[5] To support this claim, Appellant cites *State v. Angelo*,[6] which held that a business owner is not liable for the business' failure to file transaction tax returns.[7] Unlike the statute at issue in *Angelo*, however, A.R.S. Section 13-1422 does not provide that only the business entity is liable for violations of the statute. At the hearing on the Motion to Dismiss, Appellant's counsel claimed that the statute's silence regarding who is responsible means that anyone involved with the entity could potentially be

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[1] In re: Kyle M., _____ Ariz. ____, 27 P.3d 804, 805 (App. 2001). See also, *State v. Jensen*, 193 Ariz. 105, 970 P.2d 937 (App.1998)
[2] Id.
[3] 27 P.3d at 805; *State v. Fulminate,* 193 Ariz. 485, 492-3, 975 P.2d 75, 82-83 (1999).
[4] *McGovern v. McGovern*, No. D-125189, 2001 WL 1198983, at 2(Ariz. App.Div.2 Oct. 11, 2001); *Ramirez v. Health Partners of Southern Arizona*, 193 Ariz. 325, 330-31, 972 P.2d 658, 663-64 (App.1998).
[5] Appellants' Memorandum at page 4.
[6] 166 Ariz. 24, 800 P.2d 11(App. 1990).
[7] Id. at 27

liable.[8] As Appellee noted in its argument to the trial court, however, this is not the case.[9] Instead, A.R.S. Section 13-306 applies.

A.R.S. Section 13-306 provides for individual criminal liability where the offense in question was performed by an individual on behalf of the entity.[10] In *Angelo*, the court held that this creates personal liability only where there was an affirmative action performed in the name of the entity.[11] There is no liability for a failure to act.[12] The violation at issue in this matter is clearly an affirmative action. Appellant permitted the business to remain open and its dancers to remain nude after 1:00 a.m., in violation of the statute.[13] As a result, Appellant is liable for the violation of A.R.S. Section 13-1422.

3. **Vagueness of Statute**

Appellant's next claim that he should not be prosecuted under A.R.S. Section 13-1422 because the statute is unconstitutionally vague. Appellant alleges the statute does not sufficiently inform those involved with business' operations what they may or may not do. Additionally, they state the statute does not define what behavior on the part of the dancers violates the statute.

There is a strong presumption in Arizona that questioned statutes shall be presumed to be constitutional, and the party

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[8] See R.T. of March 13, 2001 at p.7.
[9] Id. at p.13.
[10] A.R.S. Section 13-306. Specifically, the statute states "[a] person is criminally liable for conduct constituting an offense where such person performs or causes to be performed in the name of or in behalf of an enterprise to the same extent as if such conduct were performed in such person's own name or behalf."
[11] 166 Ariz. at 27.
[12] Id.
[13] State's Exhibit #1, supplemental of Kevin Sanchez; Appellee's Memorandum at 3.

asserting its unconstitutionality has a burden of clearly demonstrating the unconstitutionality.[14] Whenever possible, a reviewing court should construe a statute so as to avoid rendering it unconstitutional and resolve any doubts in favor of constitutionality.[15] A statute is unconstitutionally vague if it fails to give persons of average intelligence reasonable notice of what behavior is prohibited, or if it is drafted in such a manner that permits arbitrary and discriminatory enforcement.[16] Due process does not require that a statute be drafted with absolute precision.[17] Whenever a statute's language is unclear, the courts must strive to give it a sensible construction and, if possible, uphold the constitutionality of that provision.[18]

The statute makes it very clear what behavior is prohibited. Adult cabarets and certain other specific establishments must close during the hours of 1:00 a.m. to 8:00 a.m., Monday through Saturday and 1:00 a.m. to 12:00 p.m. Sundays.[19] A business is considered an adult cabaret if it does not serve alcohol and if it regularly features nude or partially nude persons or dancers engaged in "specific sexual activities".[20] That statute references A.R.S. Section 11-821 for a definition of "specific sexual activities" [21]; it clearly defines "specific sexual activities" as, among other things, actual or simulated sexual acts or erotic touching.[22]

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[14] *State v. Lefevre*, 193 Ariz. 385, 972 P.2d 1021 (App.1998); *Larsen v. Nissan Motor Corporation in the United States*, 194 Ariz. 142, 978 P.2d 119 (App. 1998).
[15] Id.
[16] *State v. Lefevre*, supra; *State v. Stiger*, 162 Ariz. 138, 781 P.2d 616 (App. 1989).
[17] *State v. Lefevre*, supra; *State v. Takacs*, 169 Ariz. 392, 819 P.2d 978 (App. 1991)[citing *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983)].
[18] *State v. Fuenning*, supra; see, *Maricopa County Juvenile Action No. JT9065297*, 181 Ariz. 69, 80, 887 P.2d 599, 610 (App. 1994)[citing *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990)].
[19] A.R.S. Section 13-1422(A).
[20] A.R.S. Section 13-1422(D)(3)(a)-(b).
[21] A.R.S. Section 13-1422(D)(11).
[22] A.R.S. Section 11-821(G)(18).

Appellant's allegation that the statute is vague because Detective King was not able to describe the type of erotic touching that would violate the statute is also insufficient. Like Justice Stewart's famous statement regarding obscenity that "I know it when I see it,"[23] erotic touching is more easily identified than described. A reasonable person performing at or managing an adult cabaret would recognize erotic touching or other "specific sexual activities" and be able to refrain from committing such acts after 1:00 a.m.

The trial judge did not err in concluding that A.R.S. Section 13-1422 was not unconstitutionally vague.

4. **A.R.S. Section 13-1422 is not a "Special Law"**

Appellant also alleges that A.R.S. Section 13-1422 is a "special law". "Special Laws" provide benefits or favors to limited groups or localities, grant special privileges, and enlarge the rights of persons in discrimination against other rights or persons.[24] Appellant and Appellee agree that the test of a "special law" is (1) whether the statute is rationally related to a legitimate governmental objective, (2) whether the statute creates a classification that is applied uniformly to all members and cases, and (3) whether members may freely move into and out of the class.[25] It is clear the third part of this test is satisfied. Appellant does not claim that businesses cannot move freely into or out of the class of adult cabarets by its own business practices.

As discussed in the next section, the "legitimate" governmental objective" requirement is clearly met. Here, the state has a legitimate duty under its police powers to try to keep crime rates low.[26] Requiring that nude dancing be barred

[23] *Jacobelis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart J., concurring)
[24] *State Compensation Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993).
[25] *City of Tucson v. Woods*, 191 Ariz. 523, 959 P.2d 394 (App. 1997).
[26] *Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 222 (9th Cir. 1989).

during certain hours of the early morning is rationally related to that goal.[27]

Appellant's claim that the statute is a "special law" appears to rest primarily upon the allegation that it violates the requirement that the "classification is applied uniformly to all members and cases" by exempting businesses serving alcohol. Liquor establishments have their own statutes regarding nudity and hours of operation under Title 4 of the Arizona Revised Statutes.[28] As Appellee points out, these laws are more restrictive concerning permissible nudity than are those under which adult cabarets such as Appellant operates.[29] The classification created by A.R.S. Section 13-1422 is not one of all establishments featuring nude or partially nude dancers; rather, it is all establishments featuring nude or partially nude dancers and not serving alcohol. Within this classification, all members are treated equally and the statute does not constitute a "special law."

5. **Sufficiency of Governmental Purpose**

Appellant argues that A.R.S. Section 13-1422 is invalid because the legislative record does not provide sufficient reasons supporting the need for such a statute. Appellant cites the holding of *Alameda Books, Inc. v. City of Los Angeles,*[30] that there must be a "predicate evidentiary basis" for a statute in order for it to be legitimate. Appellee relies on *Barnes v. Glen Theatres, Inc.,* where the United States Supreme Court upheld a statute making it a misdemeanor to appear nude in public despite the lack of any legislative history indicating the government interests relied upon.[31]

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[27] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 569 111 S.Ct. 2456, 115 L.Ed.2d 504, (1991).
[28] See A.R.S. Sections 4-101 et.seq.
[29] Appellee's Memorandum at page 6.
[30] 222 F.3d 719(9th Cir. 2000)
[31] 501 U.S. at 567

In *Alameda*, the statute was enacted as a result of a study positing a correlation between concentrations of adult businesses and an increase in the incidence of certain crimes.[32] The court found that this study was deficient as applied to the statute because it involved a concentration of businesses rather than the impact of individual enterprises.[33] In a footnote, the court stated that the United States Supreme Court's holding in *Erie v. Pap's A.M.* [34] was not applicable because that case dealt with nude dancing rather than the adult bookstore and arcade that was the subject of *Alameda*.[35] This court must, therefore, take the opposite view and hold that the line of Supreme Court cases including *Barnes* and *Pap's A.M.* is applicable here and *Alameda* is not.

In *Pap's A.M.*, the Supreme Court held that "Erie could reasonably rely on the evidentiary foundation set forth in [*Renton v. Playtime Theatres, Inc*.[36] and *Young v. American Mini Theatres, Inc.*[37]] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood."[38] The Court in *Pap's A.M.* also relied on *Barnes*, which held that there is a "substantial governmental interest in protecting societal order and morality" which is unrelated to freedom of speech and which falls under the state's police powers.[39]

Although Appellee correctly points out that the *Barnes* court held a statute could be found to have substantial governmental interest despite the lack of a legislative record,[40] there is some indication of the legislature's intent in enacting A.R.S. Section 13-1422. In a section of the statute that was

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[32] 222 F.3d at 724
[33] Id.
[34] 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).
[35] 222F.3d at 726, n.7.
[36] 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).
[37] 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 210 (1976).
[38] 529 U.S. at 283.
[39] 501 U.S. at 569-70.
[40] Id. at 567, supra note 23.

not subsequently enacted, the legislature notes that this statute is "necessary to preserve the public peace, health and safety."[41] This language indicates that the legislature was likely relying on its ability to use its police powers as allowed under ***Barnes.*** The statute thus reflects a substantial governmental interest.

6. **The "Agreement" with the City of Phoenix**

Finally, Appellant's claims that the City of Phoenix is estopped from prosecuting his as a result of their "agreement" as memorialized in the letter from Assistant City Attorney, James Hays. The Court rejects this claim. Mr. Hays' letter states specifically that, should the business continue to remain open after 1:00 a.m., it must "operate so as not to fall within the definition of an adult cabaret…."[42] The police reports admitted into evidence upon stipulation by both parties indicate, however, that on one visit to the Appellant's business officers witnessed performances by dancers who were partially or totally nude after 1:00 a.m.[43] Nude dancing is clearly within the definition of an adult cabaret under A.R.S. Section 11-821 as used in A.R.S. Section 13-1422 and is a violation of both that statute and its interpretation as memorialized in Mr. Hays' letter.

7. **Conclusion**

For all of the reasons explained in this opinion, this Court concludes that the trial court did not err in denying Appellant's Motion to Dismiss.

IT IS ORDERED affirming the judgment and conviction imposed by the Phoenix City Court.

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[41] Ariz. Legis.296, at *5 (1996).
[42] Letter from James Hays dated October 29, 1999, at page 1; see also, R.T. of March 13, 2001 at p.16, 11. 10-20.
[43] Supra note 13.

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IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all future proceedings.